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## ARTICLE

# JOHN NOONAN ON MARRIAGE AND THE FAMILY: CONTINUITY AND CHANGE IN DOCTRINE

WILLIAM JOSEPH WAGNER\*

In John T. Noonan, Jr.'s, writings on the family, propositions of a methodological or theoretical kind appear generally only as rather modest asides in a narrative otherwise filled with fascinating, detailed historical cases, vignettes, and anecdotes. In this account, history seems to speak for itself, and what it says, of course, is that the church's moral tradition calls not simply for continuity in doctrine, but rather for a balance of continuity and change. The history that Noonan chronicles does not, however, in fact, speak for itself. It speaks from the perspective of an implicit moral methodology that imputes meaning to historical fact. The unity and persuasiveness of Noonan's historical narrative derive from his underlying moral method.

The credibility of Judge Noonan's account of what history has to say about the scope of potential change in Catholic doctrine on marriage and the family depends on the cogency of his moral methodology. This article analyzes and critiques this moral methodology. Its conclusion is that, while Noonan's historical account has considerable usefulness as an important adjunct to philosophical and theological approaches to Christian morality, his implicit moral methodology makes his account less than reliable in formulating abstract and general rules of morality. Noonan's work remains of enormous value for studies both in jurisprudence and in moral theology, but his historical findings call for integration, within these disciplines, according to normative modes of reasoning independent of those Noonan himself supplies. The metaphor—admittedly imperfect—comes to mind of Moses, who brings the people to the Promised Land, and then allows lesser men and women to enter before him, although some including Judge Noonan himself perhaps, may see in this metaphor, which from one angle may seem

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to equate normative ethics with the Promised Land and historical studies with an arid desert, tell-tale evidence of some essential difference in our respective thinking about normative reasoning.

In support of its critique, this article first analyzes Judge Noonan's general methodological vantage and shows how he proceeds, within that vantage, to formulate general moral norms. Next, it compares Judge Noonan's work with trends in the reasoning of the United States Supreme Court between 1965 and the present to suggest that some of Noonan's assumptions about the longer-term consequences of his own methodology for stability and continuity in moral theology may be unwarranted. Finally, it argues that Noonan is not justified in assuming that adjudicative reasoning, without more, suffices for the formulation of general moral norms, or that transcendent moral meaning can always be derived from the church's external practice over time. The article concludes that Noonan's adjudicative style of deriving norms does not escape an element of moral relativism, and his concept of the authority of the church, a kind of fideism.

## I. METHOD

### A. Noonan's Basic Methodological Vantage

As a federal judge, John Noonan sits on the U.S. Court of Appeals for the Ninth Circuit.<sup>1</sup> As a scholar, he has devoted most of his study to the adjudicative process, as it is encountered in both ecclesiastical and secular courts.<sup>2</sup> Not surprisingly, his moral methodology possesses an adjudicative

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1. He was appointed to the U.S. Court of Appeals for the Ninth Circuit by President Ronald Reagan in 1985.

2. John Noonan is Milo Reese Robbins Professor of Law, Emeritus, The University of California at Berkeley (Boalt Hall). Some of his books include *Narrowing the Nation's Power* (U. Cal. Press 2002); John T. Noonan, Jr. & Edward M. Gaffney, Jr., *Religious Freedom* (Foundation Press 2001); *The Lustre of Our Country: The American Experience of Religious Freedom* (U. Cal. Press 1998) [hereinafter Noonan, *Lustre*]; John T. Noonan, Jr. & Richard W. Painter, *Professional and Personal Responsibilities of the Lawyer* (Foundation Press 1997) (reprinted in 2001); *The Responsible Judge: Readings in Judicial Ethics* (John T. Noonan, Jr. & Kenneth I. Winston eds., Praeger 1993); *The Believer and the Powers that Are* (Macmillan 1987); *Bribes* (Macmillan 1984); *A Private Choice* (The Free Press 1979); *The Antelope* (U. Cal. Press 1977); *Persons and Masks of the Law* (Farrar, Straus & Giroux 1976); *Power to Dissolve* (Harvard U. Press 1972) [hereinafter Noonan, *Power to Dissolve*]; *Contraception* (Harvard U. Press 1965) [hereinafter Noonan, *Contraception*]; *The Scholastic Analysis of Usury* (Harvard U. Press 1957) [hereinafter Noonan, *Usury*]. I recall with pleasure being introduced to the writings of John Noonan in a seminar taught by Robert Cover when I was a student at Yale Law School. I was taken, at the time, by the open admiration Robert Cover expressed for Judge Noonan. In the years since, Judge Noonan has frequently visited The Catholic University of America, of which he is also an honored alumnus. No American scholar or public servant is more highly regarded by my own academic community at Catholic University Law School, than is Judge Noonan. More than anyone in American legal education, Judge Noonan has inspired me in my own vocation as a legal scholar. In view of my deep personal and professional respect for Judge Noonan, I am honored to be included in this symposium issue of the *University of St. Thomas Law Journal*.

character.<sup>3</sup> Noonan analyzes the requisites of deciding cases. He considers the decision-maker's reception of an authoritative rule derived from holdings in past cases, and he evaluates the decision maker's reformulation of the rule for whether it strikes the correct balance of continuity and change. In keeping with the adjudicative function within a community, the judgment of the right balance, then, depends on the fit of the rule with desired outcomes in future cases foreseeably arising under the rule, no less than with the case at hand.

The adjudicative character of Noonan's method appears clearly in contrast to the methodology of Thomas Aquinas. Aquinas frames a universal rule of conduct, based on self-evident prescriptive goods and correlated generalizations about what conduct best advances them.<sup>4</sup> As such, his methodology is legislative in nature.<sup>5</sup> It justifies norms, in the first instance, by reference to reason, not authority. In keeping with the inherent

3. Noonan analyzes the holdings of judges in historical context to derive reasons for optimally formulating rules:

To pierce the curial style, to look at what happened, is a species of demythologizing. But to have a judicial system at all is to start on the road from myth. A judicial system is not omniscient, it needs to know the facts, it has to listen to argument, it delivers split opinions, it makes mistakes and reverses itself, it does not exist in a sacred sphere above time. . . . Thinking first in terms of places and of dates, the system has always been embedded in human history and its movement on earth.

Noonan, *Power to Dissolve*, *supra* n. 2, at xviii - xix. Early in his career, he noted the affinity of the contemporary American legal mind for casuistic reasoning:

The American lawyer will be less apt to criticize another main attribute of the scholastics' approach, their casuistry. This kind of examination of moral principles on a case-by-case basis may, indeed, seem to consist in hairsplitting and useless subtlety to the simple-minded zealot, but such nice and detailed differentiation by examples is the price law must pay if it is to be applied at all to the varied and complex activity of men. If any criticism is to be made of the scholastics here, it is only that they did not put enough cases and tended too often to reexamine the classic situations.

Noonan, *Usury*, *supra* n. 2, at 4.

4. Aquinas formulates moral precepts from a universal and generic vantage point, the first precept of natural law:

Hence this is the first precept of law, that *good is to be done and pursued, and evil is to be avoided*. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided. . . . [W]hatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. . . . [T]hose things are said to belong to the natural law, *which nature has taught* . . . such as sexual intercourse, education of offspring, and so forth. . . . [I]t belongs to the natural law . . . to shun ignorance, to avoid offending those among whom one has to live, and other such things.

Thomas Aquinas, *Summa Theologiae* vol. 2, pt. I-II, Question 94, art. 2 (Fathers of the English Dominican Province trans., Benzinger Brothers, Inc. 1911).

5. Adjudication requires that the judge adjudicates from the perspective of a good character and vested authority, and "according to the right ruling of prudence." *Id.* at vol. 3, pt. II-II, Question 60, art. 2. The right ruling of prudence presupposes, in his view, moreover that "it does not belong to prudence to appoint the end to moral virtues but only to regulate the means." *Id.* at vol. 3, pt. II-II, Question 47, art. 6.

[T]he ends of moral virtue must of necessity pre-exist it in the reason . . . while certain things are in the practical reason by way of conclusions, and such are the means which we gather from the ends themselves. About these is prudence, which applies universal principles to the particular conclusions of practical matters.

inclination of reason, it grasps—however imperfectly—the moral meaning of actions from the standpoint of one who is able to know the universal happiness (by analogy to God).<sup>6</sup> It inquires into what reason discloses about the good of all, and into what general precepts it suggests are best suited to advancing that good.<sup>7</sup> From this vantage, Thomas arrives at precepts of right conduct.

For Thomas, the issue of authority is a criterion of due deliberation, only once the decision-maker moves beyond the fundamentals of right conduct, to promulgate concrete disciplinary rules within a particular community. At this secondary level, the validity of specific and concrete rules is decided based on the authority of the office holder promulgating them.<sup>8</sup>

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*Id.* However, adjudicative prudence is “like a particular law regarding some particular fact” in contrast to a general law. *Id.* at vol. 3, pt. II-II, Question 67, art. 1. A general law “properly speaking, regards first and foremost the order to the common good. Now to order anything to the common good, belongs either to the whole people or to someone who is the viceregent of the whole people.” *Id.* at vol. 3, pt. II-II, Question 90, art. 3. Citing Deuteronomy 1: 16, 17, 18 Aquinas observes that in establishing the government of the Jewish people, the Bible distinguished the adjudicative and legislative functions and thus it “established judges,” and separately “directed the manner of pronouncing just judgments.” *Id.* at vol. 3, pt. I-II, Question 105, art. 2.

6. The viewpoint of the legislator of moral norms according to Aquinas is universal: “Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness.” *Id.* at vol. 3, pt. I-II, Question 90, art. 2. The universality, in this view, is that of a simultaneously disinterested and benevolent deity:

*The light of Thy countenance, O Lord, is signed upon us . . . the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.*

*Id.* at vol. 3, pt. I-II, Question 91, art. 2 (emphasis in original). Aquinas assumes that human beings are capable in reason of assuming such a perspective, because of a divine spark in human reason. The divine bestowal on human beings Aquinas likens to delegation:

Thus the plan of what is to be done in a state flows from the king’s command to his inferior administrators: and again in things of art the plan of whatever is to be done by art flows from the chief craftsman to the under-craftsmen, who work with their hands. Since then the eternal law is the plan of government in the Chief Governor, all the plans of government in the inferior governors must be derived from the eternal law.

*Id.* at vol. 3, pt. I-II, Question 93, art. 3.

7. Aquinas understands this reasoning to involve a balance between principle and prudence, and abstraction and empirical judgment:

But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus, the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law, by way of conclusions . . . while some are derived therefrom by way of determination.

*Id.* at vol. 3, pt. I-II, Question 95, art. 2.

8. Aquinas cites the undetermined nature of the allocation of punishment for civil crimes under natural law, and suggests that these are binding, not as a matter of reason, but of the vested authority of the lawgiver:

*e.g.* the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature. Accordingly both

Noonan's framework substantially reverses this sequence. He moves considerations of authority into the foreground, and those of reason into second place. This shift occurs in Noonan's scheme because adjudication concerns the resolution of particular cases, rather than the formulation of general rules, and no case can be resolved without a determination at the threshold that the judge has jurisdiction over it. The jurisdictional premise in Noonan's thought is likewise the cornerstone of every system for the judicial resolution of concrete cases, whether that of rabbinic practice, the penitential rites of the Catholic Church, or the U.S. Supreme Court.

Some systems of morality—it would appear, in fact, most contemporary ones—resemble Noonan's, and in so doing depart from Aquinas'. They rely on an adjudicative or casuistic rather than legislative methodology. Kantian approaches, for example, reach moral norms through the adjudication of hypothetical cases confronting the individual moral agent, under a rule calling for consistency in moral action.<sup>9</sup> In a certain parallel, thinkers following Bentham conceive of moral norms as rules formulated for adjudicating particular cases according to an imperative that desired consequences outweigh the undesired consequences of the decision. The chain of moral reasoning in each such theory begins, no less than in the concrete casuistic systems just mentioned, with a premise of authority or jurisdiction.

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modes of determination are found in the human law. . . . [T]hose things which are derived in the second way, have no other force than that of human law.

*Id.* at vol. 3, pt. I-II, Question 95, art. 2. Such human edicts in their sphere are, according to Aquinas, binding in conscience: "Laws framed by man . . . [i]f they be just . . . have the power of binding in conscience." *Id.* at vol. 3, pt. I-II, Question 96, art. 4.

9. Kant assumes that the good that is attainable through human choice and action is that of a good will:

The realization of the *summum bonum* ["highest good"] in the world is the necessary object of a will determinable by the moral law. But in this will the *perfect accordance* of the mind with the moral law is the supreme condition of the *summum bonum*. This then must be possible, as well as its object, since it is contained in the command to promote the latter. Now, the perfect accordance of the will with the moral law is *holiness*, a perfection of which no rational being of the sensible world is capable at any moment of his existence. Since, nevertheless, it is required as practically necessary, it can only be found in a *progress in infinitum* towards that perfect accordance, and on the principles of pure practical reason it is necessary to assume such a practical progress as the real object of our will.

Immanuel Kant, *Critical Examination of Practical Reason*, in *Kant's Critique of Practical Reason: And Other Works on the Theory of Ethics* 87, 218 (Thomas Kingsmill Abbott trans., 6th ed., Longmans, Green & Co. 1909) (emphasis in original). As the moral agent discerns what each case requires for the preservation of a good will, he or she engages in what Kant refers to as "the judicial sentences of that wonderful faculty in us which we call conscience." *Id.* at 192. Kant asserts that rules for any given concrete case must be formulated according to the principle of universalizability: "Thus the universal law of right is as follows: let your external actions be such that the free application of your will can co-exist with the freedom of everyone in accordance with a universal law." Immanuel Kant, *The Metaphysics of Morals*, in *Kant's Political Writings* 131, 133 (Hans Reiss ed., H.B. Nisbet trans., 2d ed., Cambridge U. Press 1991). See also Immanuel Kant, *Good Will, Duty and the Categorical Imperative*, in *Ethics and Social Concern* 29 (Anthony Serafini ed., Paragon H. 1989).

In Kantian approaches, the postulate of authority is express. Kant champions moral autonomy. Autonomy differs from heteronomy in its allocation of authority. Bentham, on the other hand, masks his reliance on authority as a self-evident principle of reason. But, he begins no less than Kant with a claim to jurisdiction, asserting a *de facto* appointment to arbitrate the greatest sum of good possible through the resolution of conflict, considering all foreseeable cases of the kind.<sup>10</sup> This implicit premise accounts for the quality of officiousness in utilitarian thought irritating to its critics.<sup>11</sup>

A reliable understanding of John Noonan's moral methodology proceeds from the insight that its fundamental postulate is a claim to authority. As a matter of *ius divinum*, Noonan asserts that the church is authorized to resolve disputes between and among its members.<sup>12</sup> His derivation of moral norms presupposes this authority at every point.<sup>13</sup> Where Aquinas' legislative approach takes on its meaning through the universal appeal of

10. "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which appears to have to augment or diminish the happiness of the party whose interest is in question." Jeremy Bentham, *The Principles of Morals and Legislation* 2 (Prometheus Books 1988). Bentham sets out his fundamental axiom of morality as follows:

Correspondent to *discovery* and *improvement* in the natural world, is *reformation* in the moral; if that which seems a common notion be, indeed, a true one, that in the moral world there no longer remains any matter for *discovery*. Perhaps, however, this may not be the case: perhaps among such observations as would be best calculated to serve as grounds for reformation, are some which, being observations of matters of fact hitherto either incompletely noticed, or not at all would, when produced, appear capable of bearing the name of discoveries: with so little method and precision have the consequences of this fundamental axiom, *it is the greatest happiness of the greatest number that is the measure of right and wrong*, been as yet developed.

Jeremy Bentham, *A Fragment on Government* 3 (Cambridge U. Press 1988) (emphasis in original).

11. Fred R. Berger, *Classical Utilitarianism in Moral Philosophy: Historical and Critical Essays* 93, 95 (William C. Starr & Richard C. Taylor eds., Marquette U. Press 1989).

12. Catholic canon law proceeds from the primacy of divine law (*ius divinum*). This is divided into two categories: the positive divine law (*ius divinum positivum*) as revealed in redemptive history, above all in the Scriptures; and natural law (*ius naturale*) based on God's natural revelation in the created order. The *ius divinum* is universal and valid at all times; it cannot be set aside by force, nor be altered. Under this category are included the 10 commandments, the ordinance of the sacraments . . . and the papal primacy. Human law stands in contrast to the *ius divinum*, and in turn can be divided into the categories civil law (*ius civile*) and church law (*ius humanum ecclesiasticum*); it is in its essence changeable. Legislative authority for *ius humanum ecclesiasticum*, which is only binding for baptized persons, lies in the Pope for the church as a whole, and in the Bishop at the level of the diocese.

Thomas Schirrmacher, *Has Roman Catholicism Changed? An Overview of Recent Canon Law*, 1 *Antithesis* 23, 24-25 (1990) (citing H. Avenarius, *Kleines Rechtswörterbuch*).

13. Noonan asserts that "[t]he assent of human beings, which gives effect to a doctrine, is not to a single set of propositions, but to the Christian faith." Noonan, *Contraception*, *supra* n. 2, at 3. He describes the church's method in formulating evolving prescriptive demands on believers: "The options were presented in different ways. . . . The Church had to choose among them, its freedom being ultimately limited only by its own understanding." *Id.* at 6. He states that but for "the convictions of Catholics as to the authority of the Church, there would be no answer to the claim that men presumed to know what God wanted." *Id.* at 527.

reason, Noonan's adjudicative method acquires its within the "mind of the church," that is, within the church's divinely appointed jurisdiction over the ordering of its own preferences. Noonan always begins from the marks of the church's authority, rather than from the requirements of reason.

### *B. Noonan's Vantage within the Spectrum of Alternatives*

Adjudicative approaches to moral reasoning presuppose, at times, another, secondary application of the concept of authority. This application concerns the validation of the rule of decision in the case. Positions among diverse adjudicative approaches on this point occur along a spectrum. The refractions on the spectrum correspond to the relative dependence and independence of the rule in relation to a separate legislative source.

At one end of this spectrum, strict approaches consider themselves eligible to apply a rule to the extent only that a separate competent legislative authority has validated it. In concrete casuistic systems, the decision-maker may begin from an assumption of the separation of powers or functions, whereby it is eligible to apply a rule only if it can attribute the rule to a separate legislative authority. In United States government, for example, some justices of the Supreme Court consider themselves bound, as a matter of fundamental judicial restraint, to follow rules separately promulgated by Congress or the Constitution.<sup>14</sup> Similarly, in the rabbinic system, a rabbi may consider himself bound to apply the rule promulgated in the Torah.<sup>15</sup> The tribunals of the Catholic Church acknowledge themselves to be required to follow canons separately promulgated by councils or popes.<sup>16</sup> Roman Catholic penitential practice, for that matter, binds itself to norms that moral theologians have articulated as a matter of natural law in the

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14. As an example, one may cite the reasoning of Justice Antonin Scalia in the case of *Employment Division v. Smith*. In holding that the First Amendment does not authorize the Court to strike down a legislative ordinance on behalf of religious believers who are thereby restricted in the practice of their faith, Scalia states:

But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

494 U.S. 872, 890 (1990).

15. "I believe that we may say that Halakha is the wisdom of the application of the written word of the Torah to the life and history of the Jewish people." Eliezer Berkovits, *Not in Heaven: The Nature and Function of Halakha* 71 (KTAV Publ. H. Inc. 1983). Berkovits would consider it important to disavow fundamentalism in the application of the law in adjudicating cases.

16. The tribunals of the Catholic Church apply a code of laws. See *Code of Canon Law* (William Eerdman's Publ. Co. 1983).



legislative mode of a St. Thomas Aquinas, or that the Magisterium has promulgated.<sup>17</sup>

This secondary reliance on authority to validate rules of decision may arise in moral theory, in contrast to concrete casuistic systems. An evangelical or fundamentalist Christian ethic might believe itself obligated, in deciding cases, to follow rules that, in themselves, have been separately set out, in a legislative manner, in sacred scripture,<sup>18</sup> or Catholic moral theology might hold itself to be required to apply rules proclaimed by the Magisterium.<sup>19</sup> In systems of moral thought no less than in concrete systems, the meaning, then, of judicial experience is no broader than the light it sheds on truths that pre-exist. Such judicial experience always remains derivative of, and essentially subordinate to, prior legislative reasoning.

At the spectrum's midpoint, less strict approaches also apply rules supplied by prior legislative authority, but understand the legislative function to be grounded in reason in a way that permits the judge, in applying the rule to novel situations, to discover significance in both rule and situation going beyond that which the legislator specifically foresees. In these approaches, the court makes an original contribution in its formulation of rules. Thus, the Nuremberg War Crimes Tribunal moved beyond existing formulations to make new law.<sup>20</sup> However, in these approaches, the judiciary knows

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17. In the older manualist tradition, the sacrament of reconciliation was conceived strictly on the model of adjudication of guilt under authoritatively promulgated rules:

Ecclesiastical jurisdiction *in general* is defined as *the power to rule subjects for a supernatural end*. It is threefold; *legislative* for making laws, *judiciary*, for authoritatively passing judgments, and *coactive*, for inflicting penalties.

...

Wherefore, the jurisdiction of a confessor can be defined as the supernatural power, conferred by right or by the external act of a superior, by which a priest can exercise a judgment upon subjects in the internal, penitential forum. . . . [A] prudent confessor urges us to observe human laws as well as divine.

Ad. Tanquerey, *A Manual of Dogmatic Theology* vol. 2, 309-10, 316 (John Byrnes trans., Desclee Co. 1959) (emphasis in original).

18. "Christians insist that the Bible reveals the will of God in specific terms. . . . The will of God is revealed personally and historically in Jesus Christ, whose beneficiaries delight to conform to the divine commandments." *Wycliffe Dictionary of Christian Ethics* 587-88 (Carl F. H. Henry ed., Hendrickson Publishers 1973) (describing right and wrong).

19. "The moral teachings of the magisterium are to be looked upon not as legalistic rules but as precious truths intended to enable the faithful to come to know who they are and what they are to do if they are to be fully the beings God wants them to be." William E. May, *An Introduction to Moral Theology* 223 (Our Sun. Visitor Publ. Div. 1991).

20. In 1950, the International Law Commission of the United Nations adopted the principles of international law recognized in the charter of the Nuremberg tribunal and in the judgment of the tribunal: "Under General Assembly Resolution 177 (II), paragraph (a), the International Law Commission was directed to 'formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.'" *Yearbook of the International Law Commission* 1950 vol. 2, pt. 3, 374 (U.N. 1957). In the course of the consideration of this subject, "[t]he conclusion [of the Commission] was that . . . the Nuremberg principles had been affirmed by the General Assembly, the task entrusted to the Commission . . . merely to formulate them." *Id.* The text below was adopted by the Commission at its second session. The Report of the Commission also contains commentaries on the principles. *Id.* at 374-78.

itself, in the end, to be obligated to entrust the final integration of its cumulative experience to the separate legislative process.

At the spectrum's farther end, one finds approaches, that, for lack of a better description, may be termed freewheeling. These do not validate the rules they apply by reference to the rule's separate provenance, but rather understand their own jurisdiction as entailing the authority to stipulate the rule in the case. With a waning of confidence in reason's capacity to know anything universal about human nature, many modern theories in ethics have tended to abandon St. Thomas' legislative conception of moral methodology, in favor of an adjudicative one. Such approaches hold the case, hypothetical or real, to afford the moment for deriving, rather than merely applying general rules.<sup>21</sup> In a parallel manner, the erosion of their confidence in the possibility of demonstrating the truth of the legislator's prescriptions of the common good or even the legitimacy of majoritarianism, have led to modern political theories fashioning an opening for activist judges who appear to make up the meaning of the Fourteenth Amendment as they go.<sup>22</sup>

The wealth of detail about centuries of judicial experience contained in Noonan's historical studies lends itself to integration into the mid-spectrum approaches above. At many points in his exposition, he might, for that matter, himself appear to follow such an approach.<sup>23</sup> But, in the end, his method falls within the third category. He asserts that the church's jurisdiction to adjudicate brings with it ipso facto the prerogative to create the rule of the case.<sup>24</sup> Reversing the thomistic sequence, he subordinates the legislative phase in moral reasoning to the adjudicative.

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21. A convenient example would be the good reasons school of ethics which analogized moral reasoning to the adducing of reasons for holdings, akin to the reasoning of a judge in a court of law. Influential in this school of reasoning is the vocabulary supplied by Stephen Toulmin who states: "Propositions of this kind [grounds for judgments] I shall call *warrants* . . . to distinguish them from both conclusions and data." Stephen Toulmin, *The Uses of Argument* 98 (Cambridge U. Press 1958) (emphasis in original).

22. One may cite as an example the opinions of William Brennan who cast the net of judicial authority wide, and routinely at the expense of the legislative judgment of both federal and state legislatures. He departed, for instance, from precedent to conclude, for the majority, that apportionment in states electing members of Congress presents a justifiable issue. *Baker v. Carr*, 369 U.S. 186, 206-09 (1962). In a similar vein, he dissented from a majority decision holding that the standing of individuals to challenge zoning laws allegedly invidiously harmful to the interests of the poor and ethnic minorities had to be restricted to cases in which the plaintiffs had specific proof of their allegations prior to commencing discovery in the case. *Warth v. Seldin*, 422 U.S. 490, 519-21 (1975) (Brennan, White & Marshall, JJ. dissenting).

23. The reason lies in Noonan's patient and far-reaching analyses and synthesis of purely historical development as a descriptive matter. He notes that "[t]he construction can be examined for its articulateness, its logic, its consistency. The appeal to experience can be tested for its accuracy and adequacy. The literary antecedents of the rules may be established; the role played by hostile influences can be determined." Noonan, *Contraception*, *supra* n. 2, at 3.

24. Noonan refers to the rule in the case this way: "But a new balance can be struck. The consistency sought should not be verbal nor literal; nor can conformity to every past rule be

Noonan asserts that the church's jurisdiction to resolve disputes entails the prerogative of deriving the rules governing them. As such, the church's adjudicative jurisdiction is supreme. No independent principle or rule limits the church's freedom of judgment. The reasons on which the church relies do not derive their persuasiveness from any prior legislative judgment. The pivotal or fundamental place this axiom enjoys in Noonan's adjudicative method is seen in the importance he assigns to the assertion by some canonists historically that the authority of the pope "to bind and loose" obligation is subject to no substantive limit.<sup>25</sup> It is likewise manifest in Noonan's more recent assertion that the church's authority to declare acts licit or illicit is subject to no more particular limit than the norm of Jesus Christ itself:<sup>26</sup> a norm that has no substantive content, but that expresses merely the absolute and final character of the church's adjudicative power.

### C. Noonan's Mode of Reasoning Toward General Moral Norms

Of the essential features of Noonan's moral method, it remains only to outline the distinctive mode of reasoning he prescribes for deriving general rules for application in particular cases. As preamble to setting out this pattern of thought, Noonan asserts that no deontology constrains the church's adjudications. The church is to be free to revise its rules without limit.<sup>27</sup> Neither theoretical, nor logical consistency, nor respect for stare

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required." John T. Noonan, Jr., *Development in Moral Doctrine*, 54 *Theological Stud.* 662, 676 (1993).

25. Noonan describes a corresponding historical dynamic in these terms: "Curial style has designated the Pope as 'the Most Holy' and called the governing committees of administration either 'holy' or 'sacred.' Vocabulary of this kind and the pattern of petitions to God have made it seem not unnatural to make the dissolution of marriage dependent on asking the Pope for his good will and pleasure." Noonan, *Power to Dissolve*, *supra* n. 2, at xvi. The tendency has been for canon lawyers to secure an unrestricted freedom for the Church to balance values and reach an optimal outcome for the Church. Thus Thomas Sanchez asserted, "It must be believed that Christ, Who does not fail in necessities, has conferred on His Vicar full power as to those things which are necessary for the good administration of the Church." *Id.* at 133 (quoting Thomas Sanchez's *De sancto matrimonio a Sacramento*).

26. "The consistency sought should not be verbal nor literal; nor can conformity to every past rule be required. The consistency to be sought is consistency with Christ. Must not the traditional motto *semper idem* be modified, however unsettling that might be, in the direction of *plus ca change, plus c'est law meme chose*? Yes, if the principle of change is the person of Christ." Noonan, *supra* n. 24, at 676-77. Noonan explains the commensurations as fitting the measure of Christian love: "The meaning of the doctrine is grounded in a charity which escapes analysis. The propositions live, and acquire force, make sense, only for the man animated by a love of God and his neighbor." Noonan, *Contraception*, *supra* n. 2, at 3. Interestingly, Noonan's approach resembles that which David Tracy considers to lie at the heart of the inclination of the Catholic mind to seek correspondences between the impulse of redemptive love and the nature of things: "In a Christian theological perspective, the world and the self are really related as coexistents. Both are really related to the God who, as Love, is their beginning and their end. That God as Love affects all and is affected by all." David Tracy, *The Analogical Imagination: Christian Theology and the Culture of Pluralism* 438 (Crossroad Publ. Co. 1981).

27. According to Noonan, the church avoids directly admitting that it is changing the content of its propositions, because "[a] mutation in morals bewilders. Hence there is a presumption of

decisis limits the freedom of the church in its revisions.<sup>28</sup> Earlier formulations of rules and previous judicial rationales to the contrary are, in Noonan's view, no more than shorthand for a perennial imperative of optimally revising rules, under emergent circumstances.<sup>29</sup>

In Noonan's view, the church's master principal is that it is to decide individual cases so that the overall good of the community is maximized. He acknowledges any number of goods as premoral values.<sup>30</sup> He asserts that the church has tended to validate, and predictably will continue to validate, such values as constitutive of the common good, and he is especially prone to find such values in the areas of marriage and the family.<sup>31</sup> But, in his view, these values remain no more than premoral. They do not, of themselves, bind the church, as a matter of their intrinsic reasonableness or divine revelation, to follow any particular general norm.<sup>32</sup>

On a meta-level, however, Noonan's method accords certain values a moral, rather than merely premoral, status. One of these is the value of the orderly resolution of disputes within the community, according to the principle that like cases shall be treated alike. Another is the value of individual

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rightness attending the present rules, and authority is rightly vigilant to preserve them. Not every proposed mutation is good; the majority, it could be guessed, might be harmful." Noonan, *supra* n. 24, at 676.

28. "Neither the theoretical construct of what nature demanded in marriage nor the express texts of Scripture, neither the absence of precedent nor the desire for uniformity, had barred innovation by the creative lawyers of the past." Noonan, *Power to Dissolve*, *supra* n. 2, at 404.

29. E.g. Noonan, *Contraception*, *supra* n. 2, at 532 ("These opinions, now superseded, could be regarded as attempts to preserve basic values in the light of the biological data then available and in the context of the challenges then made to the Christian view of man.").

30. The teleological ethical theories (proportionalism, consequentialism), while acknowledging that moral values are indicated by reason and by Revelation, maintain that it is never possible to formulate an absolute prohibition of particular kinds of behaviour which would be in conflict, in every circumstance and in every culture, with those values. The acting subject would indeed be responsible for attaining the values pursued, but in two ways: the values or goods involved in a human act would be, from one viewpoint, of the moral order (in relation to properly moral values, such as love of God and neighbour, justice, etc.) and, from another viewpoint, of the pre-moral order, which some term non-moral, physical or ontic (in relation to the advantages and disadvantages accruing both to the agent and to all other persons possibly involved, such as, for example, health or its endangerment, physical integrity, life, death, loss of material goods, etc.).

Pope John Paul II, *Veritatis Splendor* (The Splendor of Truth), No. 75 (Aug. 6, 1993)(available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html)) (emphasis omitted) (encyclical "regarding certain fundamental questions of the church's moral teaching").

31. "At the core of the existing commitment might be found values other than the absolute, sacral value of coitus. Through a variety of formulas, five propositions had been asserted by the Church. . . . In these propositions the values of procreation, education, life, personality, and love were set forth." Noonan, *Contraception*, *supra* n. 2, at 532-33.

32. Thus, Noonan reasons that "[a]bout these values a wall had been built; the wall could be removed when it became a prison rather than a bulwark." *Id.* at 533. That "it is a perennial mistake to confuse repetition of old formulas with the living law of the Church, [which] on its pilgrim's path, has grown in grace and wisdom." *Id.* at 532. And that "[n]o single characteristic of marriage entailed indissolubility—not procreative purpose, not completed sexual intercourse, not participation of the baptized." Noonan, *Power to Dissolve*, *supra* n. 2, at 404.

freedom. In formulating general moral rules, Noonan could have relied on an abstract or theoretical concept of adjudication, such as those cited above in connection with Bentham and Kant. But he relies instead on ecclesiastical litigation. The engine driving litigation is the initiative of the individual seeking the vindication of his or her preferences. To favor the values prevailing through litigation is to build a preference for individual freedom into one's system.<sup>33</sup> Noonan not infrequently depicts ecclesiastical adjudicative reasoning as deliberation over whether to grant or deny claims of liberty, with the presumption favoring freedom.<sup>34</sup>

In Noonan's analysis of ecclesiastical decisions, the value of individual freedom interacts in a dialectic with the value of stability. The litigant struggles to obtain ever greater scope for his or her freedom to satisfy his or her preferences, and the ecclesiastical decision-maker struggles to arrive at order safeguarded by ever more adequate general rules. Both points of view contribute to the evolving content of church rules. Each new generation of claimant brings fresh preferences to the attention of the adjudicator. Each new generation of judge seeks more adequately to accommodate freedom in a pattern that respects the bounds set by the good of the community.

In its emphasis on maximizing the good, Noonan's methodology appears to be consequentialist or utilitarian. In the priority his calculus ac-

33. Thus, Noonan structures his analysis of development in the moral principles the church applies to marriage with this beginning: "To terminate a marriage within the system a priest must be asked; and to ask puts one as a petitioner." *Id.* at xvi. He notes that because principles have developed in the context of litigation that "arbitrariness" is an essential characteristic of the process. *Id.* at xv. He observes that "[t]he most substantial theological and legal accomplishment of the curial system has occurred in the effort to fit this grand design [the rule] to the multitude of [litigated] human desires." *Id.* at xvii.

34. Perhaps the most concrete instance occurs in Noonan's essay, *Natural Law, the Teaching of the Church, and the Regulation of Human Fecundity*. In this essay, Noonan proposes that the appeal to the church to change its teaching on contraception can be likened to requesting a ruling on how many days of the month a couple may have sexual relations. He concludes that, in keeping with an implicit preference for freedom, the prohibition extends only to the 96 hours in which fertility is "normal." Fertility beyond this narrow window is deemed abnormal and can be suppressed. "When it is said that this interpretation of *Humanae vitae* is minimizing and reduces its impact to a small portion of a couple's married life, it must be answered that it is scarcely an objection that the scope of a law should be narrow." Noonan, *Contraception*, *supra* n. 2, at app., 553-54. Noonan argues that "[i]n general, Christians have been called to liberty." *Id.* at 554. Noonan, more overtly addresses the priority that he believes the church accords liberty in his study of the development of doctrine leading up to the promulgation of *Dignitatis humanae* (Declaration on Religious Liberty) by the Second Vatican Council. He observes in that context that in keeping with the influence of Maritain, the church would consider

[t]he common good . . . [to] relate[ ] to both the material needs of persons and their spiritual needs . . . [and] the spiritual welfare . . . [possessing] limits set by the transcendence of the person. The common spiritual good consists in justice, beauty, truth, which the State properly cultivates. But in and through these goods the human person transcends this life. The human person is, indeed, ordained directly and ultimately to God as an absolute end, and this ordination 'transcends every created good.' The freedom of the human person is founded on this ordination beyond any material need.

Noonan, *Lustre*, *supra* n. 2, at 335-36. In adopting *Dignitatis humanae*, Noonan concludes that the church affirms "[t]he demand of human nature for such freedom." *Id.* at 352.

cords to the value of freedom, at least, it resembles, more particularly, the utilitarianism of John Stuart Mill and H.L.A. Hart.<sup>35</sup> In both respects, his method has parallels, with important adjustments reflecting his Catholic sensibility, to the implicit philosophy of the U.S. Supreme Court in its adjudication of substantive due process issues since 1965.<sup>36</sup>

In Noonan's view, the judge receives the rule as the relatively best summary of experience inherited from the past, not a definitive ordinance of legislative reason as in the writings of Aquinas. The rule always remains open to adjustment, not merely to accord with changes in fact, but essentially. The court grants ever new exceptions under the existing rule as petitioners multiply distinctions on the facts of their cases. Eventually the qualifications in the rule become so prolix that a change is implied in the rule itself. The emergence, in intellectual discourse, of new conceptions of value, as well as of evolving priorities, facilitates the eventual adoption of a new rule.<sup>37</sup> While the process of revision is unrestrictedly open-ended, the structure of reasoning about the optimal content of rules itself is invariant. Presumably, the method arises inherently in the original grant the church *ius divinum* of the authority to resolve disputes.

In the first phase of Noonan's method, he analyzes the historical record of the church's external practice in granting or denying individual claims. In this phase, he studies the church's formulation of the rules governing cases. In fact, by far, the greater part of Noonan's writings devote their attention to a penetrating exposition of such historical materials. The content of his analysis lends itself to appropriation by those moral method-

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35. Whether the influence is of Mill on Christianity, or of Christianity on Mill, that an influence is at work seems undeniable:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others.

John Stuart Mill, *On Liberty* (microformed on *Nineteenth-Century Legal Treatises*, Fiche 55, 344-55, 346, Research Publications, Inc. 1990). For a twentieth century application of the Millian priority accorded the individual in an otherwise consequentialist analysis, one may turn to the jurisprudence of H.L.A. Hart, *The Concept of Law* (Oxford U. Press 1961).

36. In the new substantive due process, the Supreme Court seeks to secure a balance of the social calculus of material advantage belonging to the legislature, and the private such calculus belonging to the individual. See e.g. *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972) (holding that unmarried persons have a right to contraceptives under the equal protection clause; that individual cost-benefit analysis over whether to bear or beget a child could not be preempted by societal norms).

37. For example, Noonan cites as influence favoring change in the church's position on contraception, "the changed environment," by which he means to refer to demographic theory, the status of women, methods of education, evolving scientific knowledge, and changes in philosophy. Noonan, *Contraception*, *supra* n. 2, at 476-91.

ologies, termed mid-spectrum above, which derive original insight from judicial experience, but, nonetheless, accord the priority to legislative reasoning. But, Noonan's work enjoys its specifically popular, as opposed to its considerable scholarly, appeal, in good part, because of its second and succinct declarative methodological phase. This second declarative phase in Noonan's method establishes that Noonan's approach falls at the end of the spectrum and accords the adjudicator untrammelled independence from any separate legislative reasoning. In his second, declarative phase, Noonan formally universalizes the rule of the case, not merely as precedent binding future cases before a church tribunal, but as a rule of moral theology binding on all in conscience.<sup>38</sup>

#### D. *Implications for the Self-Constitution of the Church as a Moral Community*

Moral theology generally understands the significance of abstract rules in relation to the character of the moral agent<sup>39</sup> or to the nature of his or her actions.<sup>40</sup> Noonan, by contrast, understands their significance in relation to the self-constitution of the church, as a community of moral practice.<sup>41</sup> He relies on this concept to support the derivation of such rules from the church's external juridical practice. He presents that practice as entailing a calculus of right and wrong which expands and contracts to fit the church's

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38. Noonan does not set out his declarations with a heavy hand: "Obviously, an answer to a theological question within the competence of the Church cannot be given by a book of this kind. . . . A history may suggest what may be regarded as ephemeral error and what has become part of the normative rules." *Id.* at 5 (emphasis added). Again, he states that "marking the circumstances in which the doctrine was composed, the controversies touching on it, the doctrinal elements now obsolete, the factors favoring further growth, this study may provide grounds for prophecy." *Id.* at 6. In one instance, at the point of declaration, he merely concludes that historical social and economic progress has made the question moot, so that there remains no rule to declare:

In general, leaving aside the prejudice attributable to religious interest or practical motive, it is clear that almost all the historical errors about the scholastic usury theory arise from a single failure: a failure to consider the theory broadly enough, to take into account either the multiple character of its foundations, theological, economic, and legal, or the multiple aspects it presented in practice, particularly the aspects under which it encouraged the growth of interest titles and above all the use of alternative methods of credit besides the loan. . . . To simplify, to find a neat, consistent, logical pattern, to teach a single lesson or draw a universal prescription—these aims [now obsolete] have animated many accounts of the old theory.

Noonan, *Usury*, *supra* n. 2, at 407.

39. E.g. Jean Porter, *The Recovery of Virtue: The Relevance of Aquinas for Christian Ethics* (Westminster/John Knox Press 1990).

40. E.g. John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980).

41. Thus, Noonan states:

[H]owever, men are able to accept law as necessary for the creation of a community, pursuit of the communal purposes may bridge the unbridgeable gap between the general norm and the individual person. Realization of the principles of love will then depend on how consciously the common purposes are held, how effectively they are communicated, how faithfully they guide action.

Noonan, *Power to Dissolve*, *supra* n. 2, at xii-xiii.

underlying judgments regarding the shape of the community it wishes to form in contemporary circumstances.<sup>42</sup>

The ecclesiastical cases Noonan studies involve intangible realities, such as the presence or absence of indelible marks in the human soul<sup>43</sup> and the capacity of a person to participate in relationships defined in intangible spiritual terms.<sup>44</sup> The ecclesiastical courts consider themselves capable of equating various empirical states of affairs as reflective of abstract values and transcendent spiritual states. In formulating rules, they hold themselves capable of judging certain human objectives as constituted by transcendent purposes.<sup>45</sup>

Both the courts Noonan studies, and Noonan himself, exhibit a distinctively Catholic trait in drawing correspondences within a juridical context, between fact and value, the tangible and intangible, the natural and supernatural, and concrete sign and abstract signification. The trait can be traced, in part, to the Catholic analogical and sacramental imagination,<sup>46</sup> and, in

42. Noonan asserts that

[a]ll of this rearrangement of values into a synthesis permitting of favoring contraception was possible. That these theories, values, practices, existed in medieval theology is a large reason why they later played such a strong role in the European consciousness. Their existence testifies to what cannot be emphasized too often. The doctrine on sexuality, as it stood, was balance—not the logical projection of a single value, but a balance of a whole set of competing values. The balance was weighted at a particular point which excluded contraception.

Noonan, *Contraception*, *supra* n. 2, at 300. He states again, “[P]olicy, that is the preserving of other values, the meetings of other needs, the balancing of other virtues, was allowed to determine dissolution.” Noonan, *Power to Dissolve*, *supra* n. 2, at 393.

43. Noonan observes that “[i]t is *de fide* that marriage is a sacrament,” citing the Council of Trent Session 7, March 3, 1547. *Id.* at 446 n. 57. He considers modes of reasoning the church employed to avoid claiming to make delible what in theory was indelible, for example, the church’s assertion that it was merely dissolving “the contract” on which the sacrament depended, not the sacrament itself. *Id.* at 341.

44. The thrust of the law, as it has developed, has been to mold marriage as an inner commitment to long-range goals, consciously apprehended and consciously accepted in the instant of consent. This preoccupation has not saved the system from large measures of artificiality—partly because the moment of consent investigated is artificially identified, partly because securing any form above the flux is a precarious enterprise, partly because concern for public order and concern for interior dispositions are difficult if not impossible to combine coherently.

*Id.* at xv.

45. The symbolism of marriage derived from Saint Paul takes the elevation of Christ to the Church as the pattern of human marriage and reciprocally invests human marriage with symbolic value as the exemplification of the ecclesial union. To endow fragile human relations with this significance, to maintain that the pattern once laid stands imperishably above the flood, has been a bold enterprise.

Noonan, *Contraception*, *supra* n. 2, at xvii.

46. David Tracy says that the Catholic theological imagination is, at its best, both analogical and dialectical:

The analogies-in-difference will express a whole series of somehow ordered relationships (the relationships within the self, the relationships of the self to other selves, to society, history, the cosmos) all established in and through reflection upon the self’s primordial experience of its similarity-in-difference to the event. The analogies will bring to expression some production by means of a theological analogical imagination: a



part, to the Catholic Church's confidence in "the power of the keys."<sup>47</sup> The courts Noonan studies treat the validation of such correspondences as having an ontological status.

Because such ontological validation is, strictly speaking, quite impossible, the validation in which such courts engage is actually prospective in nature, turning on the effectiveness of the ruling itself in creating a future community of "shared meanings." The church's power through its juridical operations to pronounce authoritatively that one thing shall be treated "as if" it is another creates a social world, mediating and mediated by a common moral universe.<sup>48</sup> Through their juridical operations, ecclesiastical officials create a visible, institutionally-validated fabric of social life, corresponding symbolically either to an ideal of natural existence, or an anticipation of the Kingdom of Heaven depending on one's point of approach.<sup>49</sup>

As Noonan develops his Catholic reading of the practice of ecclesiastical adjudication, he implicitly establishes, moreover, that the process of formulating moral norms does not constitute the church as self-sufficient, or in

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production produced by the power of an analogical imagination released by the religious event and reflected upon by the critical powers of each theologian.

Tracy, *supra* n. 26, at 410.

47. Tanqueray, *supra* n. 17, at 293-94. The church has traditionally justified its assertions of juridical authority, whether applied to moral or legal issues, to the promise Saint Matthew records Christ as making to Saint Peter, "upon this rock I will build my church . . . and I will give to thee the keys of the kingdom of heaven, and whatsoever thou shalt bind upon earth it shall be bound also in heaven, and whatsoever thou shalt loose on earth it shall be loosed also in heaven." *Matthew* 16:18-19 (King James). A consequence has been a distinctively Roman Catholic willingness to adopt legal form in virtually all that it does. Noonan sounds a particularly Catholic note, when he says:

For centuries it was argued whether a corporation was either real or something functional; it is now apparent that the term designates neither a metaphysical reality nor an imaginary entity, but relations in a legal system. *A pari*, marriage is a term which designates relations in a legal system; only by reference to the system's rules does it have intelligibility and existence. Outside of a system the term appears to be metaphor or nonsense. . . . This paradox troubles much of the legal analysis of the subject. If "true" marriage—marriage as it might be in the eye of God—is different from its definition by the rules, can its constituents be measured by a legal system?

Noonan, *Power to Dissolve*, *supra* n. 2, at xiv-xv.

48. This is essentially what Noonan means to say, when he states:

Magic, the whisking away of difficulties by a nod, the replacement of reality by illusion, is, however, but one step away from creativity, the transformation of a situation by energetic innovation. Like magic, creativity connotes spontaneity and freedom from iron law, but it also implies labor and increase by organic development. Obfuscatory satire and apology set aside, the curial system at its best has been creative. Too bound to traditional categories to acknowledge its role, the curia has not had credit for its creations.

*Id.* at xvii.

49. From the perspective of Protestantism, such an inclusion of law in the basic self-concept of the Christian is at best a purely emergency order serving at least as a brake on the worse of human sinfulness. At worst, it is an elaborate and scandalous excess of that legalism which kills the spirit. Thus the Catholic position studied by Noonan rests on a number of doctrinal assumptions, which Noonan does not expressly examine, about the nature of Christian eschatology, nature, and grace.

isolation. Rather, it simultaneously defines the relation of the church to the world or polity. The church exists, in this view, in an inherent dialectic with the world. If the church in a given era wishes to administer rules on marriage, family, and inheritance for the polity, it articulates one set of rules. If it wishes to withdraw from the role of serving the polity in these areas, it establishes a different set of rules.<sup>50</sup>

In the resulting bifurcation of spheres, the world or polity provides a laboratory of experimentation for the church.<sup>51</sup> The world's more untrammelled freedom permits the wider accumulation of human experience regarding what works and what does not, with respect to the realization of human values. Members of the church tumble along in this process where they boldly disobey ecclesiastical norms. In Noonan's scheme, the church draws implicitly from both the experience of the world, and, more specifically, from those of its members who deny the church's rulings and do what the church prohibits.<sup>52</sup> Where it finds that these enterprising folk do well as

50. Noonan notes that Christian marriage in contemporary circumstances is, No longer a necessity of social existence as it once had been in Western Europe, it could be expected not to disappear, to be more highly prized as it was more consciously chosen. Indissolubility was so tied to the great mystery of the Church, so developed as an ideal by the experience of the Christian community.

*Id.* at 403-04. He continues, "[A] type of social life which it was assumed that anyone wanting lawful sexual intercourse wanted to enter, indissoluble marriage was now becoming a form of spiritual life requiring personal perception of the values and personal dedication to their embodiment." *Id.* at 402.

51. A certain parallel exists in the role accorded the states under the unifying force of federal law, in some visions of federalism. There is, for example, Justice Brandeis's famous description of the states as laboratories of experimentation:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*New St. Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

52. In arguing that the context was ripe for change in doctrine, Noonan states,

The consciousness of the Church itself could not but be affected by the new institutional forms, the new voices, the new freedom within it, and the Christian testimony outside it. These developments produced new data on the question of contraception; they brought into being new attitudes; they created a demand for greater clarity and rationality in the rules against contraception.

Noonan, *Contraception*, *supra* n. 2, at 491. Noonan illustrates the church's implicit reliance on the experience of its members who defy its rulings in deciding whether to maintain or alter the rule in the longer rule, with the following case:

If, by some extraordinary longevity, Marie Reid, Frederick Parkhurst and Prince Rospigliosi had lived until 1955, would Marie Reid have obtained dissolution of her marriage by papal fiat? Surely in 1901, when she married Rospigliosi or in 1910, when the Rota had decided against her, a papal dissolution would have caused *admiratio* if not scandal. The strict letter of the Norms could not have been bent. But, after 1912, when Parkhurst remarried, it might have been hard to say that true scandal would have been given by permitting Marie Reid to remarry; and the risk of *admiratio* might have been more than counterbalanced by the excellence of the merits of the Rospigliosi family, the desirability of preserving the Rospigliosi offspring in the faith of their forefathers, the benefit to the faith of both the Prince and the Princess, the creation of good will among all those who believed that the Church should not, if it could help it, make a couple choose between obedience to the Church and marital embodiment of their love. In 1955

measured by its own evolving values, the church eventually relaxes its prohibitions. From the mixed bag of what it learns from the practice of the worldly and disobedient, it derives new elements to incorporate into its own changing commands, and, in so doing, gradually integrates the more general flux of human experience into its adjudicative synthesis.

## II. COMPARISON WITH THE UNITED STATES SUPREME COURT

The principal area in which John Noonan has applied his methodology has been in the family, on topics like contraception and remarriage. During the span of his scholarly career, the Supreme Court of the United States has undertaken its own revision of the treatment of these same issues in American law. Noonan and the Court have followed parallel tracks through a succession of specific contexts, each considering the scope of appropriate revision. In 1965, Noonan published his most familiar work, *Contraception*.<sup>53</sup> The same year, the Supreme Court issued *Griswold v. Connecticut*, striking down America's laws banning contraception.<sup>54</sup> In 1971, the Supreme Court handed down *Boddie v. Connecticut*, altering the status of divorce in America.<sup>55</sup> Just a year later, Noonan published his own historical study of the treatment of remarriage in canon law, entitled *The Power to Dissolve*.<sup>56</sup> The Supreme Court reached the apparent terminus of the line of development that began in *Griswold* this past year in *Lawrence v. Texas*.<sup>57</sup>

The interplay between adjudicative method and a received tradition of moral meanings in Noonan's work and that of the Supreme Court invites

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Franz Hürth, the leading Jesuit moralist in Rome, was an open champion of the power. In his view, if its exercise occasioned scandal or wonder, such reactions might be attributable to "an erroneous judgment as to an exaggerated indissolubility of marriages." The unthinkable in 1912 would have appeared as the correction of an exaggeration in 1955.

Noonan, *Power to Dissolve*, *supra* n. 2, at 385 (footnote omitted).

53. In this book, Noonan argues that the prohibition on contraception could be removed by the church, as not, in fact, advancing the values of procreation, spousal dignity, or marital love, which the Court in the past has asserted as supporting it. Noonan, *Contraception*, *supra* n. 2, at 533.

54. 381 U.S. 479, 485-87 (1965) (holding that Fourteenth Amendment liberty incorporates a zone of privacy found in the Bill of Rights that is broad enough to protect married people from legislative interference in the form of the prohibition of the use of contraception).

55. 401 U.S. 371, 381-84 (1971) (holding that the due process clause requires the state to grant access to the judicial dissolution of divorce without regard to ability to pay court costs and fees).

56. Noonan's study of the church's marriage cases from 1653 to 1923 reveals "a history of transformation," and he discovers that the changes "have had a direction, that the creative innovations have been organic, that the evolution has not ended," in general, distinguishing classes of cases to admit dissolubility in fact rather than principle. Noonan, *The Power to Dissolve*, *supra* n. 2, at xix.

57. 123 S. Ct. 2472, 2478 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."). The Court held state law prohibition on consensual sodomy between adults in private is unconstitutional because unsupported by any legitimate state interest. *Id.* at 2484.

comparison. Both Noonan and the Court commence with a received tradition. The Supreme Court, no less than Noonan, began its work in 1965 committed to such a tradition in the area of marriage, procreation, and the family. This tradition was embodied in the content the Court accorded the "liberty interest" of the Fourteenth Amendment's equal protection and due process clauses. Supreme Court precedents, such as *Pierce v. Society of Sisters*<sup>58</sup> and *Meyers v. Nebraska*,<sup>59</sup> referenced a tradition of respect under Western law accorded to marriage and procreation as basic values. Justice Harlan expressed the last undiluted statement of this older view in his concurrence in *Griswold* joining in the invalidation of Connecticut's legislative prohibition of contraception, on the narrow ground of the historic inviolability of intimate communication between husband and wife, and tracing this privilege to the special status of marriage in Western law. He implicitly connected marriage's traditional status with its procreative character.<sup>60</sup>

Beginning with the majority opinion in *Griswold*, the Supreme Court has applied a distinctive adjudicative method to reformulate this tradition. Like Noonan's, the Court's method accords priority of the value of individual freedom. The Court's more liberal justices have reread the tradition in a reductionist manner, treating it retrospectively as no more than a foreshadowing of their own abstract master principle which has been to give individual freedom priority over other community-held values in the area of sexuality and reproduction.<sup>61</sup> Conservatives, now leery of any interpreta-

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58. In *Pierce v. Society of Sisters*, the Court stated that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations." 268 U.S. 510, 535 (1925) (holding that the state may not prohibit parents' decision to educate a child in private school).

59. The Court in *Meyers v. Nebraska* noted that liberty denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. 262 U.S. 390, 399 (1923) (holding that the state may not constitutionally prohibit parents from educating a child in a foreign language).

60. In support of his concurrence, Justice Harlan cites his dissent in *Poe v. Ullman*, 367 U.S. 497, 546 (1961):

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context when children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

*Griswold*, 381 U.S. at 500 (Harlan, J. concurring).

61. A representative example can be seen in Justice Brennan's opinion in *Michael H. v. Gerald D.*, a case in which he happens to be writing a dissent:

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that "family" and "parenthood" are part

tive reading of the tradition, such as that pursued by Harlan in *Griswold*, have taken refuge, as far as possible, in narrow, positivist recitations of constitutional history or text.<sup>62</sup>

In just over thirty-five years of adjudication, a tradition, that in 1965, privileged the marital relationship and the procreation of children, now privileges individual freedom to abort, to participate in sterile sex acts, and to practice sodomy. The revised version of the tradition protects, in each instance, a calculation relating to individual choice rather than basic human relationships.<sup>63</sup> In its concrete protections, the Fourteenth Amendment now is not just different than, but in fundamental respects, the inverse of the original. Where the original scope of protection closely followed the categories of Christian theology, the current scope expressly disavows the inherited categories of Christianity.<sup>64</sup>

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of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.

491 U.S. 110, 122 (1989).

62. In *Washington v. Glucksberg*, for example, Justice Souter wrote that the second of the dissent's lessons is a reminder that the business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people.

521 U.S. 702, 764 (1997).

63. Writing for the Court, in *Eisenstadt v. Baird*, for example, Justice Brennan wrote: To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state. We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold*, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 452-53 (quoting the decision of the Court of Appeals).

64. In *Bowers v. Hardwick*, Justice White, writing for the majority, asserted that the legislature could enforce such traditional moral values over the objection of dissenters, stating that [e]ven if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Cases like *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>65</sup> and *Lawrence v. Texas*<sup>66</sup> have held, moreover, that the priority of individual liberty excludes general laws aiming to establish the polity as a community of moral value.<sup>67</sup> General rules embodying judgments about abstract values such as the bundle of values that Noonan holds, as a premoral matter, to guide adjudication in the Church, are per se unconstitutional. In the constitutional order that has emerged from the Court's revision, individuals are to have the prerogative to make these judgments exclusively for themselves.<sup>68</sup>

To compare John Noonan with the Supreme Court on the topics of marriage and the family is to discover, to be sure, the difference between them. It is, as well, to affirm the distinctively Catholic quality of Noonan's work, especially in its inclusive and integrative respect for substantive values. The comparison, nonetheless, also uncovers important similarities. Noonan, like the Court, revises a received tradition by operation of an activist judicial method confident of the comprehensive reach of its abstract principles. He, like the Court, gives a priority to the demands of individual freedom. And, he, like the Court, loosens the bond tying procreation and marriage, and, to a lesser extent, procreation and socially enforceable norms of conduct.

Noonan's revision of concrete moral norms is modest in comparison with the more radical changes of the Supreme Court. He assumes that his reformulation of moral norms will yield a pattern of common conduct constituting the church as a moral community, and a continuity of practice sufficient to transmit Catholic Christianity to future generations. Still, recent American experience of the revision of family law by the Supreme Court makes it only fair that Noonan's proposals be questioned. What if provid-

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478 U.S. 186, 196 (1986).

65. 505 U.S. 833 (1992).

66. 123 S. Ct. 2472.

67. These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.

*Planned Parenthood*, 505 U.S. at 852.

68. In *Lawrence v. Texas*, Justice Kennedy wrote:

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."

123 S. Ct. at 2480 (quoting *Planned Parenthood*, 505 U.S. at 850).

ing for the revision of moral rules according to the priority which the dialectic of litigation accords to the demands of individual freedom is actually at odds with Noonan's own assumptions of stability and continuity? What if that priority, in the end, leads to an impoverishment, and even reversal of the essential meaning of the received tradition, as has, to some degree, occurred in the jurisprudence of the Supreme Court? What if this impoverishment and eventual reversal is inevitable, once the adjudicative role in formulating norms, as Noonan advances it, is isolated from the separate, arguably prior, role of the legislator? What if the too exclusive reliance on the adjudicative revision of rules, while at times allowing for an enriched understanding of moral norms, were gradually over time destined to evacuate the content of rules by acceding, more and more, to something like the lowest common denominator?

### III. CONCLUSIONS

John Noonan's jurisprudence of judicial reasoning makes sense with respect to the adjudication practiced by judges both in the church and in society.<sup>69</sup> It also makes sense as a source of secondary enrichment adding fullness to what is, in the end, within the Catholic tradition, a legislative process of formulating moral norms.<sup>70</sup> John Noonan's books are everywhere acknowledged as an extraordinary resource of this kind. My misgivings go to Judge Noonan's extension of his method in its second succinct declarative phase, to encompass the formulation of general norms in moral theology.

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69. Benjamin Cardozo offers an example of a specifically adjudicative philosophy the scope of which is courts and what they do, not a moral system. Noonan's writings function well on this level, with the focus merely shifted to the world of ecclesiastical courts. Evocative of Noonan, Cardozo writes: "The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars." Benjamin N. Cardozo, *The Nature of the Judicial Process* 22-23 (Yale U. Press 1977). Quoting Monroe Smith, Cardozo continues:

In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

*Id.*

70. Perhaps the reticence of the Curia to acknowledge that it contributes to Noonan's own declarative phase ("[t]oo bound to traditional categories to acknowledge its role, the Curia has not had credit for its creations") arises not from stodgy bureaucratic habit, but rather from considering its work to be relevant to no more than, in the terms employed above, this mid-spectrum analysis. Noonan, *Power to Dissolve*, *supra* n. 2, at xvii.

In order to reach his statement of those norms, as was seen above, Noonan moves beyond the results of his historical studies of the church's concrete adjudication of cases. He does so in two steps: first he attributes universal normative significance to developments in ecclesiastical law, and then, he employs a consequentialist moral calculus to project their logical comprehensive extension.<sup>71</sup> Stepping back, it would appear that, taken together, these steps, as a theological matter, imply an alliance of fideism and what appears to be moral relativism. By taking the church's self-constitution as a juridically-structured community as the basis for formulating his general moral norms, Noonan appears, moreover, to exclude thereby any clear opening for integrating moral theology in a coherent Christian anthropology, vision of the moral life, or account of virtue.

An assessment of the cogency of Noonan's consequentialism would appear better left to the arguments others have made for and against consequentialism generally. The foregoing analysis does, however, offer a sufficient basis for arguing against Noonan's own characteristic reliance on the church's holdings in its concrete adjudicative practice in order to formulate general rules of morality. Noonan lacks adequate warrant for the reach of the normative conclusions he draws from such materials. Rather than being of unqualified normative import, it would appear that this practice itself calls, from time to time, for reform and even reversal, as criteria of authentic doctrine of practice require. The Catholic pattern of relying on analogy and of ascribing correspondences inspiring Noonan's interpretation of the church's legal practice helps to explain the function of legal structures within Catholicism. Undoubtedly, from the Catholic viewpoint, reliance on such legal structures can be justified as a practical matter. But, it would be an error to suppose that the church's judgments in concrete cases necessarily reflect, even when considered in large numbers over a long period of time, without more, any necessary truth transcending the practical effect of putting an end to concrete disputes. The reliance on legal form in the church can be justified, frequently merely because it works relatively well in coping with the challenges of forming a community of external practice, under the condition, specifically, of sin and finitude.

Some of the correspondences between law and fact, sacramental reality and empirical condition, that the church alleges to identify in its juridical practice can, in fact, be no more than nominal, serving as a pragmatic accommodation to the fact that the church cannot wait until the eschaton to

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71. Comparison suggests itself with a parallel method employed by Richard Posner, from a different philosophical basis. Posner sees the logic of common law judges as being essentially the logic of maximizing wealth assuming the postulates of neoclassical economics. He extrapolates from the cases a sketch of the economic reasoning the common-law judge employed to maximize wealth. Then in a declarative phase he articulates how, as this is the law's real purpose, the rule could be extended to function even more effectively. Richard A. Posner, *The Economics of Justice* 5 (Harvard U. Press 1981).



channel the energies of its common life. Any assumption that the church's practice in drawing these correspondences necessarily reflects the truth in a particular case merits challenge. A contemporary example suffices to illustrate the point. Clerical child abuse has regrettably been a not entirely uncommon recent pastoral aberration. When victims have come forward for redress, they have sometimes been persecuted by the local bishop.<sup>72</sup> In these cases, the universe of the community of shared meanings from which general moral norms are said to derive goes awry when taken to its extreme, and the child is left to correspond to nothing, because the potential for scandal is thought to correspond to the loss of everything.

Noonan's method does not sufficiently acknowledge the possibility that this break, representing sin and human finitude—a foreseeable occurrence and recurring historical fact in any legal system—can occur within the Catholic Church. As a reflection of human finitude, this weakness in law can be considered part of what Robert Cover called the "jurispathic."<sup>73</sup> Overtly unjust actions by decision makers within the church are the exception. The more common instances of the jurispathic are untold ecclesial decisions required to restore peace to the community under intractable circumstances without overt contradiction of doctrine. Such decisions ascribe significance to people, actions, and circumstances. Such decisions may be defensible as a basis for preserving practical order, but prudence and humility dictate caution in ascribing transcending normative significance to their content. This caution alone tells against the validity of the second declarative moment of Noonan's method.

Perhaps this objection based on the susceptibility of the church to sin and imperfect knowledge may be called the "Augustinian" objection. The term "Augustinian," in this context, refers to Augustine's sober awareness of the tendency of sin and self-interest to interfere even with noble efforts to order the community according to righteousness. Augustine's own autobi-

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72. A notorious example is the case of the Reverend Paul Shanley. Ralph Ranalli, *Abuse Protesters Fume as Shanley is Released on Bail*, Boston Globe A38 (Dec. 12, 2002). According to Thomas Doyle, one of the best informed commentators on the clerical-abuse crisis,

[t]he issue is that the bishops have to take a long, hard, honest look at their own responsibility, why this has been happening over the years, why it hasn't been taken care of, and number one, why the institutional Church, through its bishops and clerics, has not responded in an honest, compassionate, caring way to the victims—why it has stiff-armed them, lied to them, stonewalled them, made them wait months if not years for responses to phone calls, treated them like the enemy, refused to believe them and, in general, consistently revictimized them. That was going on all the way through from the time I became involved in 1985, and it's still going on.

Kim Lawton, *Interview: Reverend Thomas Doyle*, Religion & Ethics Newsweekly (June 27, 2003) (available at [www.pbs.org/wnet/religionandethics/week643/p-interview2.html](http://www.pbs.org/wnet/religionandethics/week643/p-interview2.html)).

73. In a now famous law review article, Robert Cover termed the judge a "jurispathic figure," who "[c]onfronting the luxuriant growth of a hundred legal traditions . . . assert[s] that this one is law and destroy[s] or tr[ies] to destroy the rest." Robert M. Cover, *The Supreme Court, 1982 Term Forward: Nomos and Narrative*, 97 Harv. L. Rev. 4, 53 (1983). Being selective in the values they vindicate confers upon them the status of the jurispathic. Perhaps it stretches the meaning of Cover's term unduly to apply it to the sacrifice by decision makers of innocent people altogether.

ography contains a poignant and ironic illustration of the objection. In the *Confessions*, Augustine describes choosing between a good and a higher good, with his choice of the higher making all the difference. He chooses to become a consecrated celibate, rather than to marry.<sup>74</sup> As background, he relates that he had already put away another woman, the mother of his son and his life companion of fifteen years.<sup>75</sup> Had this first bond corresponded to marriage then, on the terms of the narrative itself, he would have been a sinner betraying his troth, or a man merely unable to resist societal pressure rather than a Christian hero. Depending on intellectual construct, he would in either case, have been contradicting a naturally inviolable relationship or even a sacramental mark in the couple's souls.

If the bond corresponded to nothing as tradition inclines us to think it did not, the account would go on to its well known conclusion. But we will never know for sure. The saint enlightens his readers regarding many details concerning Monica and Adeodatus,<sup>76</sup> and other matters. He creates the genre of psychological if not psychoanalytical autobiography—but he shrouds this woman in a darkness incompatible with fair and open delibera-

74. Saint Augustine gives this account, "Pressure to have me married was not relaxed. Already I submitted my suit, and already a girl was promised to me principally through my mother's efforts." Saint Augustine, *Confessions* 107 (Henry Chadwick trans., Oxford U. Press 1991). He offers that then opening the Bible to the following passage found in Romans 13:13-14 led to his conversion: "Not in riots and drunken parties, not in eroticism and indecencies, not in strife and rivalry, but put on the Lord Jesus Christ and make no provision for the flesh in its lusts." *Id.* at 153. He concludes: "The effect of your converting me to yourself was that I did not now seek a wife and had no ambition for success in this world." *Id.* at 153-154. He had abandoned the idea of marrying.

75. "To modern readers nothing in Augustine's career seems more deplorable than his dismissal of his son's mother, the concubine of fifteen years." *Id.* at xvi.

76. It is interesting to compare his treatment of his former companion's loss of her 14-year-old son to his mother's sense of loss when he himself left home as a college-age student. Of his companion he says merely, "[s]he left with me the natural son I had by her. But I was unhappy." *Id.* at 109. With respect to his mother's response when he left for his studies, he writes:

The wind blew and filled our sails and the shore was lost to our sight. There, when morning came, she was crazed with grief, and with recriminations and groans she filled your ears. But you [God] paid no heed to her cries. You were using my ambitious desires as a means towards putting an end to those desires, and the longing she felt for her own flesh and blood was justly chastised by the whip of sorrows. As mothers do, she loved to have me with her.

*Id.* at 82.

In contrast to his passing in silence over his long-term companion, he is able to say of his son:

We associated with us the boy Adeodatus, my natural son begotten of my sin. You had made him a fine person. He was about fifteen years old, and his intelligence surpassed that of many serious and well-educated men. I praise you . . . my Lord God . . . [f]or I contributed nothing to that boy other than sin. You and no one else inspired us to educate him in your teaching. I gratefully acknowledge before you your gifts. One of my books is entitled *The Teacher*. There Adeodatus is in dialogue with me. You know that he was responsible for all the ideas there attributed to him in the role of my partner in the conversation. He was 16 at the time. I learnt many other remarkable things about him. His intelligence left me awestruck. Who but you could be the Maker of such wonders? Early on you took him away from life on earth. I recall him with no anxiety.

*Id.* at 163-64.

tion over the true nature of their bond. He does not tell us her name.<sup>77</sup> His omission took effort. They were a couple for a decade and a half.

The methodology uncovered in the historical studies of Judge Noonan is unable to establish any warrant for believing that the Christian community in its juridical practices is able to be consistently capable of greater honesty and forthrightness than was even this Doctor of the Church. What is missing, then, in Judge Noonan's account of history are theologically sound criteria—the first of these being Augustine's own preferred cautionary doctrine, original sin—for deciding when *lex judicandi* becomes *lex credendi*.<sup>78</sup> As a preliminary to reflection on what a fuller statement of these criteria might include, the book to recommend would not be any book that Augustine actually wrote, but rather one he did not write. With proper attribution to Elisabeth Schussler Fiorenza, and with Augustine's common-law wife in mind, we might consider entitling this imaginary work, *In Memory of Her*.<sup>79</sup>

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77. Saint Augustine describes her this way:

In those years I had a woman. She was not my partner in what is called lawful marriage. I had found her in my state of wandering desire and lack of prudence. Nevertheless, she was the only girl for me, and I was faithful to her. With her I learnt by direct experience how wide a difference there is between the partnership of marriage entered into for the sake of having a family and the mutual consent of those whose love is a matter of physical sex, and for whom the birth of a child is contrary to their intention—even though, if offspring arrive, they compel their parents to love them.

Meanwhile my sins multiplied, the woman with whom, I habitually slept was torn away from my side because she was a hindrance to my marriage. My heart which was deeply attached was cut and wounded, and left a trail of blood. She had returned to Africa vowing that she would never go with another man. She left with me the natural son I had by her. But I was unhappy, incapable of following a woman's example, and impatient of delay. I was to get the girl I had proposed to only at the end of two years. As I was not a lover of marriage but a slave of lust, I procured another woman, not of course as a wife. . . . But my wound, inflicted by the earlier parting was not healed. After inflammation and sharp pain, it festered. The pain made me as it were frigid but desperate.

*Id.* at 53, 109.

78. *Lex orandi, lex credendi* (the rule of law is the rule of faith):

[an] adage pointing out the liturgy as a source of data for the theological reflection and proof. It goes back to Pope St. Celestine I (d. 432), and to Prosper of Aquitaine (d. 246) and Augustine in their arguments against Pelagianism. Augustine taught that the Church prayer does not essentially falsify its faith, and therefore that the general prayers of the Church, starting with the Lord's Prayer, furnish a reliable guide for understanding the faith.

*Encyclopedic Dictionary of Religion* 2112 (Sisters St. Joseph Phila. 1979).

79. Elisabeth Schussler Fiorenza, *In Memory of Her: A Feminist Theological Reconstruction of Christian Origins*, epigraph (Crossroad Publ. Co. 1983) (referencing the anonymous woman who honored Christ in Mark 14:9, "Whenever the gospel is preached in the whole world, what she has done will be told in memory of her.").